

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JAMES E. CROWDER

Claimant

VS.

KANSAS NEUROLOGICAL INSTITUTE

Respondent

AND

STATE SELF-INSURED

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 152,663

ORDER

ON the 14th day of December, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of an Order entered by Administrative Law Judge James R. Ward, on November 12, 1993, came on before the Appeals Board for oral argument by telephone conference.

APPEARANCES

Claimant appeared by his attorney, Kirk W. Lowry, of Topeka, Kansas. Respondent and insurance carrier appeared by their attorney, Billy E. Newman, of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Derek J. Shafer, of Topeka, Kansas. There were no other appearances.

RECORD

The record before the Appeals Board is the same as that considered by the Administrative Law Judge as stated in the Order of November 12, 1993.

ISSUES

The respondent has requested a review of the Preliminary Hearing Order of Administrative Law Judge James R. Ward dated November 12, 1993, in which the Judge has ordered a second vocational rehabilitation vendor to assess claimant's need for vocational rehabilitation services. The issues addressed in this review are:

- (1) Does this Appeals Board have jurisdiction to decide this review?

(2) Has the Administrative Law Judge exceeded his authority by ordering a second assessment and evaluation?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds that it does not have jurisdiction to hear this review.

K.S.A. 44-551(b)(2)(A) provides that the Workers Compensation Appeals Board shall not conduct a review of a preliminary hearing award unless it is alleged that the Administrative Law Judge exceeded his jurisdiction in granting or denying the relief requested. K.S.A. 44-534a(a)(2) provides that a finding made at a preliminary hearing with regard to a disputed issue of (1) whether the employee suffered an accidental injury, (2) whether the injury arose out of and in the course of the employee's employment, (3) whether notice is given or claim timely made, or (4) whether certain defenses apply, shall be considered jurisdictional and subject to review by the Appeals Board.

In the case at hand, the issue before the Appeals Board is whether the Administrative Law Judge was whether has the jurisdiction to order a second vocational rehabilitation assessment when the first assessment exceeded the 50-day period referred to in the former version of K.S.A. 44-510g(e)(2) [L. 1990, Ch. 283, Sec. 4] that is applicable and controlling in this proceeding. The question before the Administrative Law Judge was not one of the issues enumerated in K.S.A. 44-534a referred to above. Therefore, before the Appeals Board can exercise jurisdiction over this proceeding, it must be established that the Administrative Law Judge exceeded his jurisdiction in granting the relief requested at the preliminary hearing.

(2) The Appeals Board finds that the Administrative Law Judge has the jurisdiction to order a subsequent assessment and to replace the vocational rehabilitation vendor. Therefore, as the Administrative Law Judge has not exceeded his jurisdiction, this Appeals Board does not have jurisdiction to decide this application for review, nor the authority to modify the Order of Administrative Law Judge James R. Ward dated November 12, 1993.

Respondent argues the Administrative Law Judge exceeded his authority by ordering a second assessment as respondent believes the applicable law limits assessments to a total of fifty (50) days for all assessments, and the first assessment utilized the entire fifty (50) day period. The Appeals Board does not agree with that interpretation. The statute in question provides in part:

"Within 50 days after such referral, the report shall be submitted to and received by the rehabilitation administrator and copies shall be furnished to each party. If all parties do not agree with the report, the rehabilitation administrator shall confer with the rehabilitation service provider, the employee and employer to review the assessment and the proposed rehabilitation plan in the report. The rehabilitation administrator shall ensure the assessment and the rehabilitation plan are objective and reasonable and the rehabilitation goal is reasonably obtainable." [L. 1990, Ch. 283, Sec. 4.]

The Appeals Board finds the Administrative Law Judge does have the authority to order a second assessment. As indicated in the portion of the statute quoted above, the Division of Workers Compensation through its rehabilitation administrator has the duty to ensure that vocational rehabilitation assessments are reasonable and objective. Should

respondent's argument be adopted, the Division would be unable to obtain a proper assessment any time the rehabilitation service provider exceeded 50 days in providing its initial report.

The Appeals Board finds that the language of the statute in question requires a rehabilitation service provider to complete its initial report of assessment within 50 days of the date claimant is referred for vocational rehabilitation benefits. The statute impliedly authorizes the Director through the Administrative Law Judge to order revisions, supplementation, or other modification to the assessment or vocational rehabilitation plan regardless of whether the initial 50-day period has expired.

The Administrative Law Judge has statutory authority to replace the rehabilitation service provider. See L. 1990, Ch. 283, Sec. 4, (the former K.S.A. 44-510g(l)), which provides that a qualified agency or facility providing vocational assessment, rehabilitation, reeducation or training may be replaced by the Administrative Law Judge for good cause shown. From a review of the record, it appears the Administrative Law Judge exercised restraint in not replacing the rehabilitation service provider earlier than he did. As early as May, 1993, the assistant rehabilitation administrator recommended to the parties and judge that they consider a different vendor to obtain a fresh viewpoint.

As the issue before the Appeals Board is not one enumerated in K.S.A. 44-534a, nor a situation where the Administrative Law Judge has exceeded his jurisdiction, the Order of Administrative Law Judge James R. Ward is not subject to review.

AWARD

WHEREFORE, it is the finding, decision and order of this Appeals Board that it does not have jurisdiction to review the Order of Administrative Law Judge James R. Ward, dated November 12, 1993, and said Order remains in force and effect.

IT IS SO ORDERED.

Dated this ____ day of January, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Kirk W. Lowry, 112 West Sixth, Suite 102, Topeka, Kansas 66603-3862
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James R. Ward, Administrative Law Judge
George Gomez, Director